

Public Prosecutor v Chong Nyuk Min & Anor

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HIGH COURT (IPOH) — CRIMINAL TRIAL NO 58-2-94

KANG HWEE GEE J

26 JULY 1995

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Evidence — Witness — Statements made in the course of trial — Statements made in examination-in-chief omitted in cross examination — Whether inconsistencies were within scope of s 155(d) of the Evidence Act 1950 — Whether inconsistencies that arise should be assessed accordingly by the court — Evidence Act 1950 s 155(d)

C

Evidence — Witness — Credibility of — Prosecution witnesses went for lunch together during court adjournment — Whether would cast suspicion that they were collaborating

Evidence — Witness — Credibility of — Statement in first information report — Omitted certain details which had been given by prosecution witnesses — Whether embellishments

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Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B — Trafficking in dangerous drugs — Whether presumption of possession of dangerous drugs under s 37(d) rebutted — Whether presumption of trafficking of dangerous drugs under s 37(da) rebutted

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Criminal Law — Dangerous Drugs Act (Malaysia) — s 40 — Informant evidence — Whether identity of an informer whose only function was to accompany and introduce an agent provocateur to a drug trafficker protected

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Both the accused were charged with the offence of jointly and in furtherance of a common intention of trafficking in 120.8g of heroin under s 39B of the Dangerous Drugs Act 1952 ('the Act') at an open area in a Chinese cemetery in Pusing, Perak, on 1 September 1993 at about 9.30pm. They were arrested in an operation staged by the police which involved the use of an informer and two agent provocateurs, who posed as traffickers wanting to buy the drugs from them. The main witnesses for the prosecution were Detective Police Constable Mak ('DPC Mak') and Detective Lance Corporal Cheah ('DLC Cheah'), the two agent provocateurs, and Chief Insp Zorki, who had lodged the police report against the accused and who was also a member of the ambush team who was hiding in the bush at the cemetery. The informer was not called to give evidence he produced in court. The versions of facts given by the accused were different from each other and from the prosecution. The defence challenged the credibility of the main prosecution witnesses, inter alia, on the grounds that: (i) in the cross-examination, DPC Mak had omitted to say some facts that he had mentioned in the examination-in-chief; (ii) DPC Mak had coached DLC Cheah in giving his evidence, as they were seen having lunch together during court adjournment; and (iii) the prosecution's evidence with regard to the events occurring at the cemetery had been embellished, as Chief Insp Zorki had omitted certain details of the event in his police report.

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Held, finding both the accused guilty and passing the mandatory death sentence under s 39B(2) of the Act:

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(1) It was clear that counsel for the defence could not mount impeachment proceedings against DPC Mak, as all the alleged inconsistent statements made in the course of the trial. Any variations or inconsistencies that may arise in his evidence, whether against his own evidence or against the evidence of another witness would have to be assessed accordingly by the court as they were clearly outside the scope of s 155(d) of the Evidence Act 1950, which is concerned only with inconsistencies of 'former statements'.

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(2) In respect of the challenge made by the defence counsel that DPC Mak and DLC Cheah, ie the two agent provocateurs, had discussed the case and that the former had coached the latter, the court felt that it was undesirable that witnesses appearing in court should be seen together during court adjournments in a manner that could cast suspicions that they might be collaborating to give evidence against an accused. Such an event certainly constituted a factual relevancy which must be considered in assessing the credibility of the two witnesses. However, on the facts, there was no reason why the credibility of DPC Mak should be affected because he had already finished giving his evidence when he went out for lunch with DLC Cheah. As to DLC Cheah, there was no reason to disbelieve his evidence concerning the event occurring at the place of arrest, as it was amply corroborated by the evidence of Chief Insp Zorki. Therefore, the application to impeach their credibility was not allowed.

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(3) The provision of s 107 of the Criminal Procedure Code (FMS Cap 6) which relates to the giving of information to an officer in charge of a police station regarding of the commission of a crime did not specify the details that must be included in the report. If an informant fails to include material particulars in his report which he was expected to do so, his inclusions of these particulars later in his testimony may be embellishments. Thus, it would be imprudent to draw any support from the police report for the purpose of testing the consistency of the testimonies of the witnesses for the prosecution in this case.

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(4) To sustain a charge of trafficking, it would be sufficient for the prosecution to prove that both the accused were involved with the common intention of doing of any of the acts mentioned in s 2 of the Act. It was clear from the evidence, that the prosecution had proven beyond reasonable doubt, that both the accused were acting in concert to sell and deliver heroin to the agent provocateurs. In addition, as the bag containing the drug had been in their custody or control preceding their arrest, they must

be deemed to be in possession of the heroin contained therein under s 37(d) of the Act and since its weight was in excess of 15g, they must be deemed, until the contrary was proved, to be trafficking in the drug under s 37(da)(i). A

- (5) The evidence of the respective accused was fraught with inexplicable inconsistencies and improbabilities. In totality, the court was convinced that both the accused were not telling the truth. They have failed to rebut both the presumptions of possession under s 37(d) of the Act, and trafficking under s 37(da)(i) and had, therefore, failed to raise a reasonable doubt on the prosecution's case. B

Obiter: C

The identity of an informer, whose only function was to accompany and introduce an agent provocateur to a drug trafficker is protected from disclosure under s 40 of the Act, as opposed to the position of an informer who not only introduced, but was present on more than one occasion in subsequent negotiations for the sale of drugs and at the time of the trafficker's arrest. The informer in the present case came under the former category. He was thus protected by s 40, and need not be called to give evidence. D

[Bahasa Malaysia summary E

Kedua-dua tertuduh dipertuduh dengan kesalahan secara bersama untuk melanjutkan kepada satu tujuan bersama untuk mengedar 120.8g heroin di bawah s 39B Akta Dadah Merbahaya 1952 ('Akta itu') di suatu kawasan terbuka sebuah tanah perkuburan Cina di Pusing, Perak, pada 1 September 1993, lebih kurang 9.30 malam. Mereka ditangkap dalam satu operasi yang dikendalikan oleh polis yang telah menggunakan bantuan seorang pemberi maklumat dan dua orang ejen provokasi, yang telah berlagak sebagai pengedar dadah yang ingin membeli dadah daripada mereka. Saksi-saksi utama untuk pihak pendakwaan adalah Detektif Polis Konstabel Mak ('DPC Mak') dan Detektif Lans Korporal Cheah ('DLC Cheah'), iaitu dua orang ejen provokasi tersebut dan Ketua Insp Zorki, yang membuat laporan polis terhadap tertuduh dan yang merupakan seorang anggota daripada pasukan serang hendap. Pemberi maklumat tidak dipanggil untuk memberi keterangan, dan dia juga tidak dikemukakan di mahkamah. Versi fakta-fakta yang diberi oleh tertuduh adalah berbeza daripada satu sama lain, dan juga daripada pihak pendakwaan. Pihak pembela juga mencabar kebolehpercayaan saksi utama pendakwaan, antara lain, atas alasan bahawa: (i) semasa pemeriksaan balas, DPC Mak tidak menyatakan beberapa fakta yang dia telah sebut semasa pemeriksaan utama; (ii) DPC Mak telah membimbing DLC Cheah dalam pemberian keterangannya, kerana mereka telah dinampak makan tengah hari bersama semasa penangguhan mahkamah; dan (iii) keterangan pihak pendakwaan berkenaan dengan peristiwa yang F

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A berlaku pada tanah perkuburan telah dibunga-bungai, kerana Ketua Insp Zorki tidak mengatakan beberapa perincian peristiwa tersebut dalam laporan polisnya.

Diputuskan, mendapati kedua-dua tertuduh bersalah, dan menjatuhkan hukuman mati mandatori di bawah s 39B(2) Akta itu:

- B (1) Adalah jelas bahawa peguam pihak pembela tidak boleh memulakan prosiding pencabaran terhadap DPC Mak, kerana kesemua kenyataan yang dikatakan inkonsisten tersebut dibuat semasa perbicaraan. Sebarang variasi atau tidak konsisten yang mungkin timbul dalam keterangannya, sama ada terhadap keterangan sendiri atau terhadap keterangan seorang saksi lain patut ditaksir dengan sewajarnya oleh mahkamah, kerana kenyataan tersebut adalah jelas di luar lingkungan s 155(d) Akta Keterangan 1950, yang hanya berkaitan dengan 'kenyataan dahulu' yang tidak konsisten.
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- D (2) Mengenai cabaran yang dibuat oleh peguam pihak pembela bahawa DPC Mak dan DLC Cheah, yang merupakan ejen provokasi, telah berbinčang mengenai kes tersebut dan bahawa DPC Mak telah membimbing DLC Cheah, mahkamah berpendapat bahawa adalah merupakan suatu perkara yang tidak diingini untuk saksi-saksi yang hadir di mahkamah dilihat bersama pada masa penangguhan mahkamah dalam keadaan yang mungkin menimbulkan kesangsian bahawa mereka mungkin bersuhabat dalam memberi keterangan terhadap seseorang tertuduh. Peristiwa seperti ini sudah tentu merupakan suatu fakta yang relevan yang mesti dipertimbangkan apabila mentaksirkan kebolehpercayaan kedua-dua saksi tersebut. Akan tetapi, mengikut fakta, tidak ada apa-apa sebab kenapa kebolehpercayaan DPC Mak terjejas. Maka, permohonan untuk mencabar kebolehpercayaan mereka tidak dibenarkan.
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- G (3) Peruntukan s 107 Kanun Acara Jenayah (NMB Bab 6) yang berkaitan dengan pemberian maklumat kepada seorang pegawai yang bertanggungjawab untuk satu stesen polis mengenai suatu kelakuan jenayah tidak memperihalkan butir-butir yang mesti dinyatakan dalam laporan yang berkenaan. Sekiranya seorang pemberi maklumat gagal menyatakan butir-butir yang material dalam laporannya yang dia dijangka buat, kemasukan butir-butir ini dalam testimoninya kemudian mungkin merupakan perbuatan menokok-tambah. Jadi, adalah kurang bijak untuk bergantung kepada laporan polis bagi tujuan menguji sama ada testimoni saksi-saksi pihak pendakwaan adalah konsisten atau tidak dalam kes ini.
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- I (4) Untuk mengekalkan suatu pertuduhan pengedaran dadah, adalah mencukupi jika pihak pendakwaan membuktikan bahawa kedua-dua tertuduh terlibat dengan niat bersama dalam melakukan sebarang perbuatan yang dinyatakan dalam s 2 Akta

itu. Adalah jelas daripada keterangan bahawa pihak pendakwaan telah membuktikan melebihi keraguan munasabah bahawa kedua-dua orang tertuduh tersebut bersubahat untuk menjual dan mengedar heroin kepada ejen provokasi. Juga, oleh kerana beg yang mengandungi dadah itu berada dalam jagaan atau kawalan mereka sebelum penangkapan mereka, mereka mesti disifatkan sebagai memiliki heroin yang terkandung dalam beg tersebut di bawah s 37(d) Akta itu, dan kerana beratnya melebihi 15g, mereka mesti disifatkan, sehingga sebaliknya dibuktikan, bahawa mereka mengedar dadah di bawah s 37(da)(i).

- (5) Keterangan yang dibuat oleh tertuduh masing-masing adalah penuh dengan keterangan yang tidak konsisten yang tidak dapat dijelaskan dan ketidakmungkinan. Secara keseluruhannya, mahkamah adalah yakin bahawa kedua-dua tertuduh tidak bercakap benar. Mereka telah gagal untuk mematahkan kedua-dua anggapan milikan di bawah s 37(d) Akta itu, dan pengedaran dadah di bawah s 37(da) dan, oleh yang demikian, telah gagal untuk membangkitkan keraguan munasabah terhadap kes pihak pendakwaan.

Obiter:

Identiti pemberi maklumat yang hanya berfungsi untuk menemani dan memperkenalkan ejen provokasi kepada seorang pengedar dadah adalah dilindungi di bawah s 40 Akta itu, berbeza dengan kedudukan seorang pemberi maklumat yang bukan sahaja memperkenalkan, tetapi telah hadir lebih daripada satu kali dalam rundingan yang berikutan berkenaan dengan jualan dadah, dan semasa pengungkapan pengedar tersebut. Pemberi maklumat dalam kes ini jatuh di bawah kategori pertama. Maka, dia dilindungi oleh s 40 dan tidak perlu dipanggil untuk memberi keterangan.]

[*Editorial note:* The defendants have appealed to the Court of Appeal vide Criminal Appeal No A-05-79-95.]

Notes

For case on witnesses, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1635-1737.

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26-108; [1989] *Mallal's Digest* 592-621; [1990] *Mallal's Digest* 463-467; [1991] *Mallal's Digest* 820-849; [1992] *Mallal's Digest* 657-671; [1993] *Mallal's Digest* 526-538; [1994] *Mallal's Digest* 849-870.

Cases referred to

Jagdeep Singh v State of Haryana AIR 1974 SC 1978 (distd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (folld)
Mohamad Radhi bin Yaacob v PP [1991] 3 MLJ 169 (folld)

- A *Munusamy v PP* [1987] 1 MLJ 492 (folld)
Namasiyam & Ors v PP [1987] 2 MLJ 336 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (distsd)

Legislation referred to

- B Criminal Procedure Code (FMS Cap 6) ss 107, 399
 Dangerous Drugs Act 1952 ss 2, 37 (d), 37 (da)(i), 39B, 40, 40A(2),
 First Schedule
 Evidence Act 1950 s 155(d)
 Penal Code s 302 [India]
- C *Chew Soo Ho* (Deputy Public Prosecutor) for the Public Prosecutor.
PM Mahalingam (PM Mahalingam & Co) for the first accused.
Jula Singh (Paramjit & Co) for the second accused.

Cur Adv Vult

- D **Kang Hwee Gee J:** Both the accused were charged with the offence of jointly and in furtherance of a common intention of trafficking in 120.8g of heroin under s 39B of the Dangerous Drugs Act 1952 ('the Act') at an open area in a Chinese cemetery at Pusing, Perak on 1 September 1993 at about 9.30pm.

- E They were arrested in an operation staged by the police from the cawangan anti dadah ('the CAD') Perak, which involved the use of an informer and two agent provocateurs, Detective Police Constable Mak Lean Seing ('DPC Mak') and Detective Lance Corporal Cheah Yew Teik ('DLC Cheah') who posed as traffickers wanting to buy the drug from
- F them.

- G The main witnesses for the prosecution were DPC Mak ('PW5') and DLC Cheah ('PW6') the two agent provocateurs, and Chief Insp Zorki ('PW7'), a member of the ambush team who was hiding in the bush at the cemetery and who was able to observe and describe the events leading to the arrest. The informer was not called to give evidence, and neither was he produced in court.

THE CASE OF THE PROSECUTION

- H The case for the prosecution is best described by the following summary of events:

On 28 July 1993

- I DPC Mak received instruction to act as an agent provocateur from ASP Mohd Isa ('DW3') his superior in the CAD. On 4 August 1993, at about 5 pm, he was introduced to the informer through a Detective Corporal Busra at a restaurant in Bruas town. At about 6pm, he was brought by the informer to the house of the second accused who was known as Ah Meng at the Kampong Baru, Buas. At this meeting, the second accused informed him that he could supply him with heroin. DPC Mak gave his pager

number to the second accused for the purpose of contacting him when the drug could be supplied. A

On 15 August 1993

At about 12 noon, DPC Mak received a call from the second accused through the pager. He called the second accused back by phone and was asked to meet him at his house at Bruas to be introduced to his friend. As planned, DPC Mak met the second accused at his house in Kampong Baru, Bruas at 5.30pm. The second accused led him to a food stall near the second accused's house at Jalan Besar, Bruas. There, the second accused introduced him to the first accused who was known as Ah Hock. The three of them then discussed about the supply of heroin. The first accused promised to supply DPC Mak four pounds of heroin at the price of RM3,300 per pound. It was agreed that when the supply of heroin was available, the second accused would contact DPC Mak through his pager No 577999-85017. At the meeting, DPC Mak had assumed the name of Ah Seng, a drug trafficker from Ipoh. B C D

On 25 August 1993

DPC Mak received a call from the second accused through his pager. He called the second accused, and was informed that the supply of heroin would arrive on 30 August 1993, and that he should be ready to receive it on that date. E

On 27 August 1993

DPC Mak received a call from the second accused through his pager. He called the second accused who informed him that the supply of drug would not arrive on 30 August 1993 as fixed earlier. The second accused said he would be contacted when the supply arrived. F

On 30 August 1993

DPC Mak received another call from the second accused through his pager. He returned the call and was informed by the caller that the supply of drug would arrive on 1 September 1993, and that he would be contacted before the drug is delivered. G

On 1 September 1993

DPC Mak received a call from the second accused through his pager at 2.30pm. He returned the call. The second accused informed him that the supply was ready, and requested DPC Mak to wait for him in front of the Esso petrol station, Pusing, at 8pm on the same day. They discussed about the place where the drug was to be handed over. DPC Mak informed the second accused that he would bring along another person who was his partner at the time of delivery. The second accused told DPC Mak to look for the place of delivery. DPC Mak then conveyed this information to ASP Mohd Isa. H I

A At about 4pm, DPC Mak proceeded to Pusing town with DC Busra, ASP Mohd Isa, and another police personnel DLC Cheah who was earlier inducted as the second agent provocateur by ASP Mohd Isa, to scout for a suitable place of delivery of the drug. They found an area in a Chinese cemetery which was situated at the 11th km of the Lahat/Pusing road.

B At 6pm, ASP Mohd Isa conducted a briefing at the CAD, Perak, for the purpose of staging an ambush to arrest both the accused who would be delivering the drug to DPC Mak and DLC Cheah at the intended place. The officers were divided into five teams. The first three teams were assigned to conduct the actual ambush, while the fourth team was assigned to provide assistance where necessary. The fifth team was assigned to keep observation. The accused were to be arrested upon DPC Mak giving a signal by lighting his lighter and saying the word 'OK!'. A flash role of RM20,000 was provided to DPC Mak for the purpose of showing it to the accused as the money for the purchase.

D At about 7.30pm, the ambush party consisting of the five teams took their position at the cemetery. At about 8pm, DLC Cheah left for the cemetery while DPC Mak proceeded to the Esso station, Pusing, each driving their own car.

E At 8.45pm, DPC Mak met the second accused at the road in front of the Esso petrol station as agreed between them earlier. The second accused then brought DPC Mak to the first accused who was seated in his parked car across the road from the station. DPC Mak asked the first accused who was by then standing outside his car, regarding the supply of drug. The first accused informed DPC Mak that the supply had not arrived, and requested him to wait. Leaving the first accused at the place, DPC Mak then brought the second accused in his car to the cemetery. There, DPC Mak introduced the second accused to DLC Cheah who was waiting there. He then brought the second accused back to the Esso petrol station where they first met. When they arrived, the first accused was still waiting there. DPC Mak then made a U-turn and drove over to meet the first accused. He parked behind the first accused's car. The first accused informed DPC Mak that he wanted to deliver the drug at the side of a main road, and requested DPC Mak to follow him. DPC Mak disagreed, and counter-proposed that the delivery be made at the cemetery as he wanted to examine the drug and that the money for the purchase was with his partner who was waiting there. The first accused then asked DPC Mak to wait at the Esso petrol station, while both the accused left in the first accused's car. After waiting there for five to ten minutes, DPC Mak decided to drive to the cemetery to inform DLC Cheah and the ambush party to be ready for the arrest. DPC Mak then decided to return to the Esso petrol station. On the way there, he noticed the first accused's car coming from the opposite direction. He made a U-turn and drove back to the cemetery.

I At about 9.25pm, the first and the second accused arrived at the cemetery in the first accused's car, and stopped about three to four feet

away from DLC Cheah's car. The second accused who was seated beside the first accused alighted from the car, carrying a plastic bag with him. He walked towards DLC Cheah. He showed DLC Cheah the bag and told him in cantonese that the four pounds of heroin was in the bag. He asked DLC Cheah to check the content quickly. He placed the plastic bag on the front bonnet of DLC Cheah's car. He then opened the plastic bag and brought out a package from the bag which was wrapped in newspaper. He unwrapped the newspaper, brought out a thin plastic packet containing powdery substance, and handed it over to DLC Cheah who examined it by digging a hole using his finger and pretending to taste the content by licking his finger. He repeated the process for the remaining seven packets containing the same material which the second accused handed over to him one by one, the packets being returned back to the bag after each examination. The first accused, meanwhile, had walked over to where DLC Cheah and the second accused were. At this juncture, DPC Mak arrived in his car alone. He parked it on the left side of the first accused's car. DPC Mak alighted from his car and walk towards them. The first accused then took the bag containing the eight packets of drugs from the bonnet of DLC Cheah's car and placed it on the ground about three to four feet away for DPC Mak to examine. All four of them then squatted around the bag while DPC Mak took out some substance from one of the eight packets in the bag and put it on a piece of cigarette foil which he had brought along. He then used his lighter to burn the foil. After ascertaining that the substance was heroin, DPC Mak shouted 'OK!', the prearranged signal for the arrest. DPC Mak pushed the first accused who was squatting in front of him down and arrested him. At the same time, DLC Cheah arrested the second accused by catching hold of his neck. They were assisted by the arresting team who had by then sprung into action.

The plastic bag ('exh P4') was recovered from the ground by Chief Insp Zorki. In it, he found eight plastic packets ('exh P12(1)-(8)') each wrapped in chinese newspaper ('exh P5(a)-(h)'), and each containing powdery substance (ex P13) which he suspected to be heroin.

The accused were brought to the Pusing police station together with the exhibit at about 10pm where Chief Insp Zorki lodged a report ('exh D11') of the arrest. Chief Insp Zorki then marked the bag and its content and handed it over to the investigating officer ASP Ahmad Dhalan ('PW8') at 2am the next morning on 2 September 1993, together with the two accused.

The drug was sent to the government chemist Lam Yoke Ching of the chemistry department Ipoh, for analysis at 3.30pm on the same day by ASP Ahmad Dhalan. He collected it back from Lam Yoke Ching on 18 December 1993, together with the chemist report ('exh P8') which confirmed that the drug in the eight plastic packets was heroin, ie a dangerous drug listed in the First Schedule of the Act, weighing a total of 120.8g.

The report was served on both the accused at the Parit Magistrates' Court in accordance with s 399 of the Criminal Procedure Code (FMS Cap 6) ('the Code') on 25 January 1994, and since the defence did not

- A apply to cross-examine the chemist, the report was admitted into evidence as conclusive proof that the drug analysed was the dangerous drug of heroin weighing 120.8g.

FINDING AT THE CLOSE OF PROSECUTION'S CASE

- B At the close of the case for the prosecution, after having considered the various issues raised by counsel for the first accused, and after hearing submissions from both parties, I found the charge against both the accused proved beyond reasonable doubt, which if unrebutted would warrant his conviction in accordance with the principle in *Khooh Hi Chiang v PP* [1994] 1 MLJ 265. Accordingly, I called them to enter their defence.

- C I will now state my reasons.

That both DPC Mak and DLC Cheah were both agent provocateurs was clear from the narrative of the prosecution's case, the drug being recovered in consequence of the part played by them to entice the accused to do so. Consequently, all statements uttered by the respective accused to

- D were rendered admissible under s 40A(2) of the Act.

The thrust of the defence cross-examination at this stage was directed towards challenging the credibility of these two witnesses and Chief Insp Zorki whose evidence was confined to narrating from his ambush position at the cemetery, the event leading to the arrest of the accused and recovery of the drug and in the lodging of the police report thereafter.

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For convenience, I will first deal with these challenges, the first of which was an attempt by counsel for the first accused to impeach the credit of DPC Mak on the grounds that:

- F (1) the witness did not give a proper account of where he saw the bag was placed when he arrived at the scene — he did not state whether it was on the boot or the bonnet of DLC Cheah's car;

- (2) that the witness' testimony is inconsistent with the police report ('exh P18'), lodged by Chief Insp Zorki which did not mention that the first accused took the bag and put it on the ground;

- G (3) the witness during cross-examination said that he had not asked any particular person 'mana barang?', but in examination-in-chief, he said he had directed the question to the first accused; and

- (4) the witness during cross-examination omitted to say that the first accused showed him the plastic which was on the bonnet of DLC Cheah's car, but had said so in examination-in-chief.

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It was clear that these four points could not constitute any valid ground on which counsel could mount his impeachment proceeding on DPC Mak. They were all statements made in the course of this trial. Any variations or inconsistency that may arise in his evidence whether against his own evidence or against the evidence of another witness would have to be assessed accordingly by the court. They were clearly outside the scope of s 155(d) of the Evidence Act 1950 which is concerned only with inconsistencies of 'former statements'. Accordingly, I disallowed counsel's application.

- I

Next, the same counsel proceeded to cross-examine DLC Cheah whether he had driven off from the court's compound in a car together with DPC Mak for lunch. DLC Cheah admitted having done so, but denied he had discussed this case with DPC Mak or that he was coached by DPC Mak what to say in court. He explained that he and DPC Mak were from the same squad, and that it was not unusual for them to meet. On being recalled for cross-examination by counsel on this point, DPC Mak also admitted going in the same car with DLC Cheah for lunch but denied discussing this case with DLC Cheah or coaching him. He explained that they were friends from the same office and came from the same town of Alor Star, Kedah, and that it was not unusual for them to meet for lunch.

I must say that the conduct of DPC Mak and DLC Cheah in this respect left much to be desired. It is undesirable that witnesses appearing in court should be seen together during court adjournment in a manner that could cast suspicions that they may be collaborating to give evidence against an accused. Such an encounter certainly constitutes a factual relevancy which must be considered in assessing the credibility of the two witnesses. In this instance, however, I saw no reason why the credibility of DPC Mak should be affected, as he had already finished giving his evidence when he went out for lunch with DLC Cheah. As for DLC Cheah, his evidence was concerned with the event occurring at the place of arrest. There was no reason to disbelieve his account of the part played by the respective accused at that place, as this was amply corroborated by the evidence of Chief Insp Zorki who gave the same account of the event.

In the course of his cross-examinations of DPC Mak, DLC Cheah and Chief Insp Zorki, counsel for the first accused had requested these witnesses to sketch the respective positions of both the accused, DPC Mak and DLC Cheah relative to the position of the cars parked at the scene at the moment of arrest. Their sketches were respectively produced as defence exhibits D10, D14 and D17. Counsel submitted at the close of the prosecution's case that there were substantial differences in these sketches which in his view throws their credibility into serious doubt. Having examined the sketches, it was clear to me that the differences were not material and relate only to the positions of the three cars in relation to the positions of the four persons which in my view were attributable mainly to the poverty of the human mind to register and remember details. Generally, the sketches were consistent with regard to the place where the four persons were squatting and the place where the bag containing the drug was placed. I, therefore, agreed with the submission of the learned deputy public prosecutor that the discrepancies were minor in nature and does not, therefore, affect the credibilities of the witnesses.

As a further challenge to his credibility, DPC Mak was also cross-examined on whether he had submitted mileage claim for the trips he made in the course of this operation, which counsel submitted was relevant for the purpose of ascertaining the credibility of this witness to which DPC Mak had admitted that he had not made any claim in respect of this case. Notwithstanding this, I was of the view that this issue could not constitute

A a substantial ground to undermine the credibility of DPC Mak, in so far as it relates to whether or not he had made the trips to Bruas and Pusing, given the fact that other prosecution witnesses had materially corroborated his evidence.

B To sustain a charge of trafficking, it would be sufficient for the prosecution to prove that both the accused were involved with the common intention of doing of any acts mentioned in s 2 of the Act, which includes either, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug (in this case heroin).

C It was clear to me that the prosecution had proved beyond reasonable doubt at this stage from the evidence of DPC Mak, DLC Cheah and Chief Insp Zorki, that both the accused were acting in concert to sell and deliver the consignment of heroin to the CAD agents, DPC Mak and DLC Cheah at the cemetery when they were arrested.

D It was also clear that since the bag containing the drug had been in their custody or control preceding their arrest, they must be deemed to be in possession of the heroin contained therein under s 37(d) and since its weight was in excess of 15g, they must be deemed until the contrary is proved, to be trafficking in the drug, under s 37(da)(i) of the Act. Hence,
E my decision to call both the accused to enter their defence.

In so deciding, I had considered the position of the informer who was not called to give evidence, although this point was never brought out by the defence in their submission. The identity of an informer whose only function was to accompany and introduce an agent provocateur to a drug trafficker is protected from disclosure under s 40 of the Act (*Munusamy v PP* [1987] 1 MLJ 492), as opposed to the position of an informer who not only introduced but was present on more than one occasion in the subsequent negotiations for the sale of the drug and at the time of the trafficker's arrest (*Namasiyam & Ors v PP* [1987] 2 MLJ 336). It was clear that the informer in the present case falls under the former category,
F having made his appearance only once on 15 August 1993, when he introduced the second accused to DPC Mak. He was, therefore, protected by s 40 of the Act and need not be called to give evidence.

Further, I had also taken into consideration the submission of counsel for the first accused on the omission of Chief Insp Zorki to mention in his police report the following four important points that:
H

- (1) the second accused had taken the bag containing the drug from the first accused's car, and placed it on the bonnet of DLC Cheah's car;
- (2) both the accused had stood near DLC Cheah while he was examining the contents of the bag;
- I (3) the first accused had taken the said bag from the bonnet and put it on the ground; and
- (4) both the accused were squatting together with DPC Mak and DLC Cheah while Mak was examining the drug.

Counsel had submitted that there was a strong probability that the prosecution's evidence with regard to the events occurring at the cemetery which led to the arrest of the accused had been embellished, as these were facts primary to the unfolding of the case against the accused, which Chief Insp Zorki was bound by law to state. In the event, counsel submitted that the evidence of both the agent provocateurs DPC Mak and DLC Cheah should be rejected.

This issue was in fact the focus of counsel's cross-examination of Chief Insp Zorki, who gave the reason that under the law he was only obliged to state only such details as time and place of incident and the actual arrest and seizure. I saw no reason to disagree with this witness. The provision of s 107 of the Code which relates to the giving of information to an officer in charge of a police station of the commission of a crime did not specify the details that must be included in his report. On the other hand, I would also not disagree with counsel's contention that if an informant fails to include material particulars in his report where in the circumstances of the case he was expected to do so, his inclusion of these particulars later in his testimony may be mere embellishments, a principle which counsel submitted was applied in the Indian Supreme Court case of *Jagdish Singh v State of Haryana* AIR 1974 SC 1978 at p 1979. In that case which involved a charge of murder under s 302 of the Indian Penal Code, the informant, one Surjit Kaur had omitted to mention in her police report, inter alia, the presence of Bachni, a co-accused in the charge. In her testimony, she had stated that Bachni was standing behind Jagdish Singh, the accused who fired the shot that killed the victim. The Supreme Court of India found that having regard to the particular situation that the informant was in, 'it is hardly likely that Surjit Kaur would have skipped reference to these facts in the statement (report) which she made almost immediately after the incident'. It was held that her testimony with regard to the presence of Bachni at the scene was obviously an embellishment which ought to be rejected.

The prevailing circumstances in the present case that led Chief Insp Zorki to lodge the report was however different. His report only relates to the arrest of the accused in a planned operation which did not concern the inspector alone but the entire group of the CAD. He had no personal interest in the case, unlike the situation in *Jagdish Singh* which involved interested parties (the informant being a step-daughter of the murder victim). Theoretically, the circumstances prevailing in the present case was such that the prosecution could have embellished the report itself if they had so wished, in which case it would only be necessary for their witnesses to tailor their evidence in court to suit the particulars mentioned in the report in order to obtain consistency. In view, therefore, it would be most imprudent to draw any support from the police report for the purposes of testing the consistency of the testimonies of the witnesses for the prosecution. I had, therefore, refrained from doing so.

- A Both the accused gave evidence on oath. They did not deny that they were arrested at the cemetery, that the bag containing the drugs were brought there in the car driven by the first accused, and that was recovered at the cemetery.

- B Their evidence with regard to how they were arrested and the antecedents leading to the arrest, however, differed. Their respective evidence was as follows.

The first accused's testimony

- C Prior to their arrest at the cemetery on 1 September 1993, he had met second accused who was his friend, at a mee stall at Bruas. The second accused was in the company of DPC Mak at the time. There, the second accused introduced him to DPC Mak. He was with them for about 15 minutes. He denied that there was any discussion on the sale and purchase of drugs among the three of them as related by DPC Mak.

- D He denied meeting Mak at the side of the road opposite the Esso station at Pusing on 1 September 1993 at about 8.00–8.10pm as alleged by the prosecution. He was at that time with the second accused at that place, but omitted to say how and where he had met the second accused before that. The second accused directed him to drive to the Chinese cemetery (the place of arrest). He complied and drove there guided by the second accused. He came to a dead end. He stopped his car. The second accused got out and brought out a plastic bag from the foot-well of second accused's feet. The second accused then walked to where DLC Cheah was standing at a parked car. He turned his car around in the opposite direction facing the entrance of the graveyard. He remained seated in the car for a short while. Another car then came into the area. DPC Mak came out of this car and walked towards the other parked car where DLC Cheah and the second accused were. He then got out of his own car and lighted a cigarette. He then walked towards that car in order to call the second accused to return to his car, so that they could both go off. While walking to call second accused, the police arrested both of them.

- G With regard to the presence of the bag, his story was that a young man whom he did not know had put it at the foot-well of his car at the place from where the second accused had obtained it while it was parked at the side of the road opposite the Esso station just before he proceeded to the cemetery with the second accused.

- H He alleged that DPC Mak was lying, when he said that he had taken the plastic bag from the bonnet of the other car and placed it on the ground. He denied knowing the contents of the bag. He denied seeing DPC Cheah testing the drugs when it was placed on the bonnet of the other car. He also denied that DPC Mak tested the drug on the ground.

I *The second accused's testimony*

At about 6pm on 4 August 1993, the second accused alleged that DPC Mak, whom he did not know at that time came to his house to enquire where one Ah Hock (the first accused) whom he knew lived. He informed

DPC Mak that the accused lived three houses away from the shop where there was a mee stall. He denied that DPC Mak had given him his pager number for the purpose of enabling him to contact DPC Mak.

On 15 August 1993, at about 5.30 pm, DPC Mak came to see him again, to look for Ah Hock. He decided to bring him to Ah Hock's house. On the way there, he saw Ah Hock eating mee at a mee stall near his house. He then brought DPC Mak to where the first accused was seated, but did not introduce him to the first accused. They started to converse by themselves. He was seated at the same table with them at first, but while they were talking, he ordered aerated water and proceeded to join another friend at another table. Later, he went home on his own, after DPC Mak and the first accused had left.

On 1 September 1993, at about 7pm, the first accused came to his house in Kampong Baru, Bruas, by his car and invited him to go to a karaoke lounge in Ipoh. After taking his bath, he followed the first accused. When they reached the Esso station in Pusing at about 8pm, the first accused stopped the car on the opposite side of the station across the road. He got out of the car after being informed by the first accused that he was going to make a telephone call and to buy cigarette at the station. After he came out of the station, he saw another car parked next to the first accused's car. He saw DPC Mak standing by the side of the first accused's car, and he was talking to the first accused. After they had finished talking, the first accused told him to wait there for a while in his car. DPC Mak then brought him into his car and drove off towards the direction of Ipoh, telling him that he was going to look for his friend. DPC Mak brought him to the place of incident. He remained seated in DPC Mak's car while DPC Mak got out and walked towards a person whom he now knows as DLC Cheah, who was at that time standing beside another car. DPC Mak then came back to his car and drove him back to the Esso station in Pusing to meet the first accused. The first accused was not there at the time DPC Mak left the place, leaving him there after instructing him to bring the first accused to the cemetery. The first accused arrived a short while later in his car stopping on the opposite side of the road from the station. He walked across the road from the Esso petrol station to the first accused and got into his car. He told the first accused what DPC Mak had said and led him to the place of incident.

He did not notice the presence of any plastic bag at the foot-well of his seat when he was in the first accused's car. Upon reaching the place, the first accused turned his car to face the opposite direction. The first accused then instructed him to take the plastic bag (which according to him was placed not on the foot-well of his seat but on the floor-board behind his seat), and placed it on the bonnet of the other car near where DLC Cheah was standing. He did as instructed. DLC Cheah asked him why DPC Mak was not around. He did not know the contents of the plastic bag. He went to the side of the car to urinate after placing the bag there. While he was doing so, DPC Mak arrived in his car with its headlights dimmed. DPC Mak walked out of the car and went to speak to

- A DLC Cheah. He could not hear what they spoke, neither was he aware whether the first accused was with them. He then walked towards Mak's car to take his packet of cigarettes which he had left behind in the car. After he had done so, DLC Cheah caught hold of him by the neck.

- B He alleged that he did not plan with the first accused to supply drugs to anyone. The sole reason he went with the first accused in his car was to follow him to a karaoke lounge in Ipoh for a drink.

Other witnesses

The first defendant called three police witnesses which were offered to the defence at the close of the prosecution's case. They were:

- C (1) ASP Mohd Isa bin Abd Wahab ('DW3');
(2) Detective Lance Corporal Jaafar bin Manaf ('DLC Jaafar/DW4'); and
(3) Detective Corporal Abu Samah bin Salleh ('DC Abu Samah/DW5').

- D All the three police witnesses were in the ambush party at the cemetery. Their role was subsidiary in nature being deployed to make observation and to assist in the arrest of the accused, if necessary. ASP Mohd Isa and DLC Jaafar were stationed at a position some 26-27ft away from where the place of arrest. DC Abu Samah was stationed further away at a position some 60ft away. All of them were lying on their chests in the bushes. Although they admitted their role was to make observation, they claimed that they were not in a position to give a frame by frame account of the events leading to the arrest of the accused as their views were necessarily obstructed by the undergrowth they were in.

- F However, both ASP Mohd Isa and DLC Jaafar were able to confirm the prosecution's story, that both the accused were with DPC Mak and DLC Cheah at a position near DLC Cheah's car while in a squatting position when they were arrested and that he saw the flash of a lighter and heard the word 'OK!' the signal for the arrest.

- G Defence counsel for the first accused applied to impeach the credit of DW3 against a statement ('exh D22') which he had personally recorded from DW3 earlier. In that statement; DW3 had said that he saw the first accused went near the second accused. Defence counsel contended that DW3 in his testimony was able to describe the happening just before the arrest, whereas in his statement, he had admitted that apart from seeing the first accused going near the second accused at the place where they were arrested, he did not see what they did.

- I DW3 claimed that he was not asked any specific questions on the movement of the respective accused. His statement was restricted to merely answering the few questions asked by counsel. What he meant by the statement, 'Apart from that I did not see what both accused did,' was that he did not see both the accused taking anything with them. Considering the brevity of the statement recorded by counsel, which in my view was not sufficiently clear to mean that the witness did not see the subsequent

events that transpired that led to the arrest of both the accused, I accepted the explanation and disallowed the impeachment. A

It was clear that the defence of the first and second accused differed in the following material respects:

(1) Meeting at the mee stall:

Both the accused did not deny that the second accused introduced DPC Mak to the first accused at the mee stall, but they denied that they were involved in the initial discussion on the intended sale and purchase of heroin there. B

(2) Meeting at the road across the Esso petrol station:

The first accused's story was clearly a denial that he ever met DPC Mak at the roadside opposite the petrol station on 1 September 1993 at 8.30pm, while the second accused claimed that the first accused had met DPC Mak there. C

(3) Events at the cemetery:

Both the accused did not deny that the drug was conveyed in the first accused's car to the cemetery, and that it was placed on the bonnet of DLC Cheah's car by the second accused. The first accused claimed that someone he did not know had placed it in his car at the Esso petrol station, but the second accused claimed that he only became aware of the bag containing the drug when he was asked by the first accused to take it to DLC Cheah when they arrived at the cemetery. The first accused, on the other hand, denied that he had instructed the second accused to do so. D E

FINDING AT CLOSE OF CASE FOR THE DEFENCE F

To earn an acquittal, the accused must in particular rebut on a balance of probabilities, both the presumption of possession under s 37(d) and the presumption of trafficking under s 37(da)(i) of the Act, and in general raise a reasonable doubt on the prosecution's case. (See *Mohamad Radhi bin Yaacob v PP* [1991] 3 MLJ 169.) G

In my judgment, the evidence of the respective accused was fraught with inexplicable inconsistencies and improbabilities.

I find the first and second accused's denial that they had never entered into any discussions with DPC Mak on the sale of the heroin at the mee stall on 15 August 1993, and that they were never involved in the discussion with DPC Mak at the road opposite the Esso petrol station on 1 September 1993, with regard to the place where the drug was to be delivered, improbable. Their denial is clearly inconsistent with the fact that they had both proceeded to the place of delivery at the cemetery with the drug which was carried in their car — a fact which they did not deny. H I

I find the first accused's claim that the bag containing the drug was put into his car by a male Chinese whom he did not know (but whom he assumed to be a friend of the second accused) while it was parked at the

A side of the road across the Esso petrol station, and his denial of knowledge of the contents of the bag inherently incredible. He had not bothered to enquire from that person why it was put there. Neither was he bothered to examine what the bag contained. His conduct defied reason, and was not consistent with what a reasonable man would do under the circumstances.

B I also find the second accused's claim that he had no knowledge at all that the bag containing the heroin was in the car driven by the first accused inconsistent with his conduct of readily following the first accused's instruction to take the bag from his car and to place it on the bonnet of DLC Cheah's car without bothering to ask the first accused what it contained, and why it had to be so delivered in such surreptitious
C surrounding of the cemetery in the dark of the night.

The second accused's claim that the first accused had come to his house to invite him to go to Ipoh (to the karaoke lounge) was inconsistent with his conduct in readily following the accused in his car to the cemetery, and obeying his instruction to place the bag containing the heroin on the
D bonnet of DLC Cheah's car. It is also contrary to the evidence of the first accused that it was the second accused who directed him to go to the cemetery where the second accused had on his own accord brought out the bag from his car to where DLC Cheah was.

E On account of these inconsistencies and improbabilities, and assessing their evidence in totality, I am convinced that both the accused were not telling the truth as against the prosecution case that the heroin were delivered to DPC Mak and DLC Cheah at the cemetery following the agreement to sell the drug to them earlier.

F Accordingly, I find that they have failed to rebut both the presumptions of possession and trafficking, and had therefore failed to raise a reasonable doubt on the prosecution's case.

They are found guilty and convicted.

SENTENCE

G I have no discretion in sentencing, and would have to pass the mandatory death sentence as provided under s 39B(2) of the Act on both the accused, which I hereby do.

POSTSCRIPT

H Two days before I delivered my judgment in this case, but after I had completed it in draft, counsel for the accused brought to my attention by letter the case of *Ti Chuee Hiang v PP* [1995] 2 MLJ 433, which had just been delivered by the Federal Court.

I In *Ti Chuee Hiang*, an informer who had previously introduced the accused to an agent provocateur, had through a friend contacted the accused to come to a restaurant to negotiate a deal for the supply of heroin. It was held that the informer had in fact assumed the mantle of an agent provocateur, although he and his friend were never involved in the

subsequent negotiation, having left the restaurant earlier before the arrival of the accused. He was, therefore, not entitled to the protection from disclosure under s 40 of the Act. It was further held that the so called informer and his friend in that case were both essential witnesses to the unfolding of the narrative of the prosecution's case and failure to call them to give evidence would result in the accused's acquittal. (See p 440D-G.)

The case appears to have cast upon the prosecution a hitherto unsaid duty to call all witnesses 'essential to the unfolding of the narrative on which the prosecution's case is based', or at the very least to offer him for cross-examination where the prosecution decides that such a witness was not capable of belief. But it is also clear from the judgment that the statutory provision of s 40 of the Act still protects an informer from disclosure, unless he assumes the mantle of an agent provocateur (as in *Ti Chuee Hiang*), in which case he would lose that protection and would have to be called or offered for cross-examination. It would appear, therefore, the law in *Munusamy v PP* that an informer, who only introduced a drug trafficker to an agent without more does not lose that protection, is still good law.

Much as I appreciate counsel's industry in transmitting *Ti Chuee Hiang* for my consideration, I must state that it would not change my finding earlier that the informer in the present case was protected under s 40 of the Act, and need not be called or offered to the defence as a witness, and consequently, my finding that the prosecution had proved their case beyond reasonable doubt at the close of their case.

Order accordingly.

Reported by Premala Pathmanathan

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